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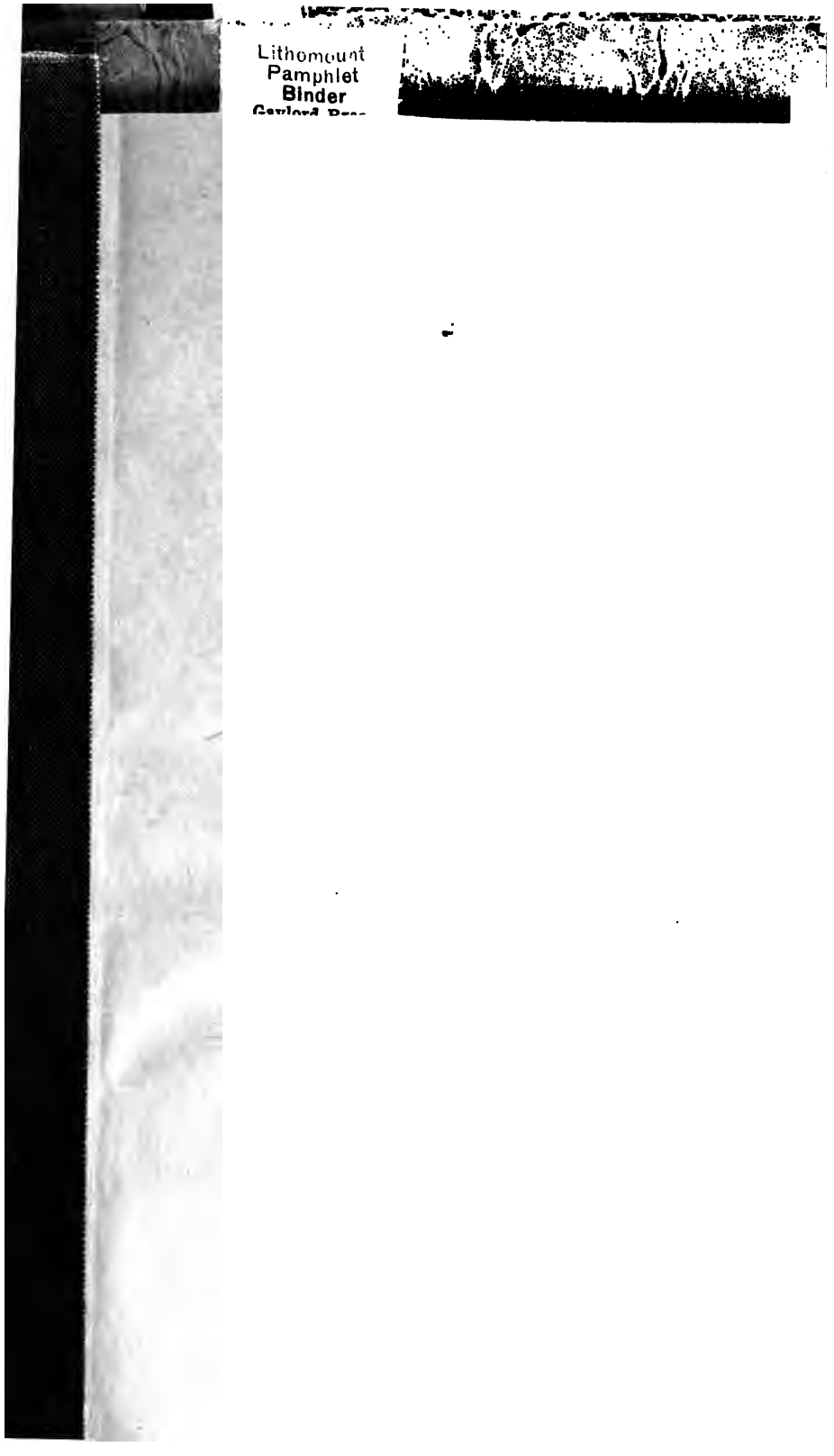
1834

Argument ... delivered before the Court of Appeals at Charleston ...

By

Petigru



ARGUMENT

OF

JAMES L. PETIGRU, ESQ.

DELIVERED BEFORE THE

COURT OF APPEALS, AT CHARLESTON;

ON THE

CONSTITUTIONALITY OF AN ACT OF THE LEGISLATURE,

PASSED 19TH DECEMBER, 1833.

ENTITLED

AN ACT TO PROVIDE FOR THE MILITARY ORGANIZATION OF THIS STATE.

Charleston:
PUBLISHED BY J. S. BURGES.
1834.

IN THE COURT OF APPEALS.

MONDAY, MARCH 31, 1834.

PRESENT, JUSTICES JOHNSON & HARPER.

The State, Ex Relatione Edward M'Crady,
vs.
Col. B. F. Hunt, Commanding 16th Reg't So. Ca. Militia.

The members of the Legislature, who were elected on the 5th of October, 1832, at an extra session, on the 26th day of October, passed an Act to provide for the calling of a Convention of the People of this State, the Preamble and first Clause of which are as follows:

Whereas, the Congress of the United States hath, on divers occasions, enactd laws laying duties and imposts for the purpose of encouraging and protecting domestic or American manufactures, and for other unwarrantable purposes; which laws, in the opinion of the good people of this State, and the Legislature thereof, are unauthorized by the Constitution of the United States, and are an infringement of the rights reserved to the States respectively, and operate to the grievous injury and oppression of the citizens of South-Carolina. And whereas, to the State assembled in Convention, it belongs to determine the character of such acts, as well as the nature and extent of the evil, and the mode and measure of redress:

Be it therefore enacted, by the Senate and House of Representatives of the State of South-Carolina, now met and sitting in General Assembly, and it is hereby ordained by the authority of the same, That a Convention of the People of the said State, shall be assembled at Columbia, on the third Monday in November next, then and there to take into consideration the several Acts of the Congress of the United States, imposing duties on foreign imports for the protection of domestic manufactures, and for other unauthorized objects; to determine on the character thereof, and to devise the means of redress; and further, in like manner, to take into consideration such acts of the said Congress laying duties on imports, as may be passed in amendment of, or substitution for, the act or acts aforesaid; and also, all other laws and acts of the Government of the United States, which shall be passed or done, for the purpose of more effectually executing and enforcing the same.

The Convention at Columbia, on the 18th March, 1833, passed an Ordinance, entitled An Ordinance to nullify an Act of the Congress of the United States, entitled "An Act further to provide for the collection of duties on imports," commonly called the Force Bill, containing a separate clause in the following words:—We do further ordain and declare, that the allegiance of the citizens of this State, while they continue such, is due to the said State; and that obedience only, and not allegiance, is due by them to any other power or authority, to whom a control over them has been, or may be delegated by the State; and that the General Assembly of the said State, is hereby empowered, from time to time, when they may deem it proper, to provide for the administration to the citizens and officers of the State, or such of the said officers as they may think fit, of suitable oaths or affirmations, binding them to the observance of such allegiance, and abjuring all other allegiance; and also *to define what shall amount to* a violation of their allegiance, and to provide the proper punishment for such violation.

By an Act passed on the 19th day of December, 1833, entitled "An Act to provide for the Military organization of this State," it was enacted as follows:—"In addition to the oaths now required by law, every officer of the Militia, hereafter elected, shall, before he enters on the duties of his office, take and subscribe, before some person authorized by law to administer oaths, the following oath:—'I, A. B., do solemnly swear, (or affirm, as the case may be) that I will be faithful and true allegiance bear to the State of South-Carolina.'"

On the 28th of February 1834, Edward M'Crady was elected Lieutenant of the Washington Light Infantry, a military corps in the city of Charleston, and applied for his commission, which Colonel Hunt, the commanding officer of the Regiment, refused to grant, unless he would take the above oath; which he refused to do, and applied to Judge Bay, for a rule to shew cause why a Writ of Mandamus should not issue, to require the said Colonel Hunt to deliver to the plaintiff his commission.

His Honor, upon hearing the case, dismissed the rule; and from his judgment the Relator appeals, and moves the Court of Appeals to reverse the order made by Judge Bay, and to make the rule absolute, and takes in support of his motion the following grounds:

First, That it is a violation of the Constitution of the State, to require the appellant to take the oath contained in the Military Bill. Because the 4th article of the Constitution declares, that "All persons who shall be chosen or appointed to any office of profit or trust, before entering on the execution thereof, shall take the following oath:—"I do swear or affirm, that I am duly qualified, according to the constitution of this State, to exercise the office to which I have been appointed, and will, to the best of my abilities, discharge the duties thereof, and preserve, protect and defend the constitution of this State, and of the United States." And that so much of the Military Bill as goes to add to or alter the foregoing oath, or to impose any other oath of office, is, therefore, unconstitutional and void.

Secondly, That the authority of the Legislature to enact the oath contained in the Military Bill, cannot be derived from the Ordinance of 1833, for the following reasons:

1. That the terms of the Ordinance are not pursued, nor its authority referred to, in the enactment of the said oath; nor does it appear, with certainty, that the oath contained in the Military Bill, is an oath binding the citizen to the observance of *such* allegiance as the Ordinance defines.

2. Because the Convention did not authorize, and in fact could not authorize, the Legislature to overrule the Constitution, by changing one of its articles, without conforming to the rule, by which all amendments to

Constitution must take place. And for this proposition, the appellant has the authority of the same Legislature, who, by bringing in and passing a Bill to change the Constitution in this behalf, have confirmed and ratified this construction.

3. Because the Convention, in undertaking to define allegiance, and to establish a Test Oath, exceeded their powers, as those matters are not within the objects for which they were called.

4. Because the Ordinance itself is clearly repugnant to the Constitution of the United States, and therefore null and void.

MR. PETIGRU'S ARGUMENT.

A case that has excited so deeply the attention of the community, will no doubt receive the most serious consideration of this Court. To say that it is a Cousitutional question, is enough to make it understood that the subject is one of the highest concern and interest; for a question of constitutional law exceeds in importance the discussion of a private right, as much as a general rule is of more importance than a particular decision. And if there is any thing of which we may be justly proud as an improvement in the science of Government, it is that American innovation, by which the Judiciary is made co-ordinate with the Legislature, and the injured are authorized to appeal from the Law to the Constitution. Nor can any case be imagined more worthy of the exercise of this high and solemn duty of the Judiciary than this, in which the decision must affect, not merely the freedom of an individual, but the right of many thousands of the people of this country to be accounted free—in which not the inheritance of a few acres only, but the birthright and portion of every man who does not subscribe to the prevailing creed, are at stake. The parties to the Record are Mr. M'Crady and Colonel Hunt—and the office about which the dispute arises is one of minor importance; an office, not only of small account in itself, but in the eyes of the parties perfectly insignificant, in comparison with the principles which are involved. Between the parties to the Record there is in fact no dispute. Col. Hunt consents to make the question for the sake of all who have an interest in common with the Plaintiff: and Mr. M'Crady pursues his right in behalf of thousands of his fellow citizens, for the purpose of testing the validity of a law, which incapacitates them from office. This civil incapacity with which we are menaced, extends not merely to offices in the militia but to all places of power and trust under the authority of the State; and not to the right of holding office merely, but to every constitutional and civil privilege. For by the Ordinance of 1833, the principle of disfranchisement is adopted in the broadest terms of tyranny—and though the disability in question applies in this instance to military office only, there is nothing to prevent the extension of the principle to all civil rights and immunities whatever.

The Oath which Mr. M'Crady is required to take is in the following terms: "I swear that I will be faithful and true allegiance bear to the State of South-Carolina,"—and he refuses to take it, because he acknowledges allegiance to the United States, as well as to the State of S. Carolina, and the authors of this oath, by their authoritative construction, have declared that allegiance to the one, is and shall be equivalent to abjuration of allegiance to the United States. The terms of the Oath itself may not suggest the objection. The text may be ambiguous, but the commentary removes all doubt. Behold then the alternative to disfranchisement, which is submitted to the citizen—to subscribe to a party test, or swallow an ambiguous oath.

Allegiance is derived from the barbarous latin word [illegible] peculiar to the English law, and there we must look for its proper signification. Fortunately we are at no loss for the most ample information concerning the character of allegiance in the monarchy which is its native soil. In Calvin's case 7 Co 1., it forms the subject of one of the most curious and elaborate arguments among the judicial discussions of that period. It is called the Bond of Subjection between the Prince and his subject; the tie by which the monarch holds his vassal, and by which he draws him from the remotest corner to which he can retreat. A chain which none but the royal hand can hold, and which the subject can never shake off. It is the same in effect with liege homage, an abject ceremony which furnishes a striking illustration of the feudal origin of allegiance, and the profound subjection which it implies. "For when the tenant shall make homage to his Lord, he shall be ungirt and his head uncovered, and his Lord shall sit, and the tenant shall kneel before him on both his knees, and hold his hands jointly together between the hands of his Lord, and shall say thus, "I become your man from this day forward of life and limb, and of earthly worship, and unto you shall be true and faithful." And then the Lord so sitting shall kiss him." In simple homage, there is a reservation; as thus, "saving the faith, I owe our Sovereign Lord the King." But in liege homage, which differs only in this, that it is performed to none but the Sovereign, there is no such saving. (Co. Lit. 64b.—1 H. H. 65.) From Calvin's case and the common law authorities, we learn that the qualities of allegiance, are: that it is natural, universal and perpetual—and due exclusively to the King in his natural person. So intimately is the original idea of allegiance connected with royalty, that it is said by Lord Coke to belong to the King as an attribute *proprium quarto modo*—that is—to the King, and to the King always: to every King, and to none but the King—*omni solo semper*—7 Co. 12a.

In strict propriety of language, allegiance to the State, like citizen King, is nothing more than a misnomer. No phrase can be less apt to express the duty of a citizen, whose obedience belongs to the law, than a word which implies most strongly and emphatically, reverence and subjection to the *person* of the sovereign. We can easily conceive why our ancestors excluded from the Constitution of the United States, as well as from that of South-Carolina, a word connected with so many heterogeneous associations as allegiance; the wonder is that the noble example of plain dealing and simplicity which they have left us, should be lost on their successors; and that we should see at the present day, such an anxiety on the part of some people to put on the cast off finery of the Royal Livery.

There is no doubt, however, that when terms which express the relation between King and Subject, are adopted into the laws of a Republic, they must be received in a new sense, with a modification of meaning corresponding to the altered character of the Government. And so in fact we find the term allegiance used in some of the States. Neither do we deny that the State may require an Oath of Allegiance from her citizens. At least there is as much propriety in speaking of allegiance to the State, as of allegiauce to the United States. No one supposes that the government of the United States is supreme, beyond the sphere plainly defined by the constitution: Neither does any one deny that the State is supreme within its proper sphere of action. As to the boundaries of power between the Federal authorities and the State authorities, men have disputed from the dawn of the constitution to the present day: and from the assumption of the State debts, in 1790, to the last debate on the incorporation of the Bank of the United States, the acts of the General Government have been assailed and defended on the same grounds; and

truth requires us to add, that South Carolina has been on every side of the same question. But that the States, in the language of Mr. Madison, retain a residuary and inviolable sovereignty over all objects, not embraced within the powers of the General Government, has never been denied, amidst the changes and contentions of party; at least not by any men or set of men, considerable enough to obtain for their opinions any general attention. If the oath in question, therefore, stood alone or upon the words of the Military Bill only, we should, without hesitation, construe the obligation which it imposes, as an oath of fidelity to the State, commensurate with its reserved sovereignty, and consistent with an equal fidelity to the United States, within the sphere of the constitution. But if the State authorities have set their own definition on this term "allegiance," we are not at liberty, in the oath under consideration, to construe it in any other way; and no honest man can take the oath in any other sense than that which it would bear if this word was omitted, and the corresponding terms of the definition inserted in its place. Now the fact is, that the authors of this measure have set a definition on the word allegiance, which makes it to all intents and purposes, a term of art, to express certain controverted opinions concerning the nature of the constitution of the United States, and renders the oath in question a complete criterion of party—in one word, a Test Oath. There is, I apprehend, a mistake that some people are very liable to fall into, in speaking on this subject, by confounding test oaths with religious persecution; for many persons seem to imagine that the new oath is not a test oath, because it does not interfere with religious liberty. But in fact, all test oaths are political, not religious, in their objects; and if Test Acts do sometimes put the principle of exclusion on religious opinions, it is not against such opinions as offensive to Heaven, but as dangerous to the state that they are directed. In the age of persecution, a sincere but misguided zeal for the honor of God and for the salvation of man, led to the punishment of the heretic, whether he outwardly conformed or openly dissented. But Test Oaths were the growth of a later age; they were not exacted *pro salute animi*—for the spiritual welfare of people in office; but had their rise, as well as whatever justification was ever attempted of them, in considerations of public safety. The Union of Church and State, and the King's supremacy, sufficiently account for the connexion, real or supposed, between the security of the State and the exclusion from office of those whose religious opinions were at variance with the majority. The Dissenters and the Catholic were against the Church, and the Church was part of the State. It was in vain that they were willing to give any and every assurance of their fidelity to the State as distinguished from the Church—for their interests were inseparably connected, and the distinction could not be admitted. In like manner, the Union Party are willing to give any satisfaction of their devotion to the State within its constitutional sphere, but the difficulty lies in acknowledging an absolute supremacy—in subscribing to a declaration that Gov. Hayne is supreme head of the Church upon earth.

In Mr. Locke's Works, we find an account of the Test Oath of 1675, by a masterly hand. It runs in these words —"I do declare that it is not lawful, under any pretence whatever, to take up arms against the King—and that I do abhor that traitorous position of taking arms by his authority against his person, or against those who are commissioned by him, in pursuance to such commission; and I do swear that I will not at any time endeavor the alteration of the Government in Church or State." This Oath would suit the present times without any alteration besides that of putting State for King: And the authors of our Test Oath only repeat, what the Courtiers of Charles the Second had previously said, that the public safety requires the Oath; and that no one should complain of being excluded by it; because no one is fit to be trusted, that is not willing to swear to truths so plain, and to principles so clear. Yet the verdict of posterity has stamped the age of Charles the Second with its lasting reprobation; and those who, upon a small scale, are now making a similar use of power, may do well to bear in mind that they are copying an example from the worst of men, and the worst of times.

In looking to the Ordinance of 1833, we find that allegiance to the State is expressly declared to be inconsistent with allegiance to the United States. The obedience due to the Constitution of the United States is declared to be a subordinate duty, subject to the regulation of the Legislature, so that a citizen may actually incur punishment as a criminal for acting in obedience to the Constitution of the United States—and to crown the whole, ample provision is made, by an unlimited power, of punishing offences against allegiance, for opening those detested sources of oppression, the laws against treason, and re-enacting here the bloody tragedies of Scrogges & Jeffries.

It is not wonderful that a new Oath, speaking a language unknown to our Constitution, should excite inquiry. Men are not to be blamed for asking what it is they are required to swear to. But where shall they search for the meaning of allegiance, as used in this Oath? Not in the common law, nor in the Constitution, but in the Ordinance of 1833—and there they will find allegiance, explained in a sense which renders it the symbol of a party—a sense, in which it never was defined before, and which nothing but the necessity of having a conventional term to designate certain peculiar views of the Constitution, could ever have suggested. Allegiance which is absolute without being perpetual, is a perfect anomaly. Yet, the ordinance, while it makes allegiance to the State paramount to all other obligations, confines its existence to actual residence: for, I know not what else can be made of the words, "so long as they continue citizens thereof," unless they mean that allegiance begins whenever any citizen of the United States enters Carolina, and ends when he crosses the line. And what can be made of those words, that speak of "obedience to any power to whom a control over the citizens of this State, has been, or may be delegated," unless they mean that the laws of the United States are binding, until the State interposes and sets them aside? In one word, allegiance as used in the ordinance, is only another word for the *right to nullify*, and, that such is the real intent and meaning of it, no one having a regard for his reputation, out of his own sect or party should venture to deny—and no one who values his character, can take this Oath, unless his mind be clearly satisfied of the creed which it is intended to enforce.

The ordinance having thus established a party test and authorized the Legislature to carry it into effect by suitable oaths, the next Legislature passed an act to organize the Militia of this State; the 10th section of which, provides, that every officer hereafter elected, before entering on the duties of his office, shall take a certain oath. And in order to determine upon the validity of that oath, it is necessary to consider the subject in reference to the State Constitution, as well as to the Ordinance. But the Constitution has fixed the oath of office, and the Legislature have no right, under the Constitution, to Legislate on the subject. Their authority therefore must be derived from the Ordinance, or the oath is void. The supporters of the Bill are placed in this dilemma—if the oath is passed in pursuance of the Ordinance, it is a test oath—and, if not passed in pursuance of the Ordinance, it is unconstitutional. It is indifferent to

which alternative is adopted, for either way the Oath is bad; but, the objection to the Oath, as being contrary to the Constitution, is so palpable from the express provision, that a certain oath shall be taken by all officers as a constitutional qualification—the inference that no additional oath can be imposed for the same purpose, is so manifest, that I shall leave this part of the case without further comment—and proceed to consider whether this Oath can be maintained upon the Ordinance. And we contend that it cannot.

1. When an act may work two ways, the one by an interest, and the other by an authority, and the act is indifferent, the law will refer it to the interest and not to the authority—Hobart, 159—the case of commendams—Clere's case,6. Co. 291. Maundrell *vs.* Maundrell, 10 ves. 257—Turner *vs.* Bradford, 3. Ruf. 354. The rule is, that if the power is not referred to, the subject must be clearly identified, or it will not pass by the power. But it does not clearly appear in this case, that the Legislature intended to pursue the ordinance. The word allegiance is the only thing that can lead to a supposition that they had in view such an oath as the Ordinance contemplates. But the nature of allegiance to the State, is a controverted question, and it is on the face of the act ambiguous whether the Legislature meant a partial or paranount allegiance. The rules which prevail in relation to the execution of private powers, are intended for the safety of the citizen, for the sake of certainty, and to prevent the danger of arbitrary judgment. How much more strongly do all those reasons lead to the conclusion, that the act in this case, should be referred to the Constitutional inherent right of the Legislature, and not to an extraneous and adventitious power? If it is necessary that men should be secure in their estates, and that the rule of property should be certain, how much more important that their rights and privileges should not be guessed and conjectured away? Respect for the Legislature, should forbid us to suppose that they meant the words of this oath in a party sense; for, though Test Oaths have been the fruits of the worst of times, yet to impose a test, and to establish the principle of disfranchisement in this underhand and clandestine manner, would be a new and unexampled instance of political profligacy.

But here it may be said that the Act must be referred to the power contained in the ordinance, because it can take effect in no other way. In answer to this objection, it is sufficient to refer to the opinion of his Honor, Judge Bay—he supports the Oath on the authority of the Legislature under the constitution; and there is no reason to attribute to the members of the Legislature a higher degree of legal acumen. Is it not a thousand times better that an Act should be declared unconstitutional, than that the courts should place upon it a construction and give it a meaning which the Legislature did not intend?

(Judge Harper. On this part of the case I would throw out for your consideration that the words of the constitution are affirmative not negative—Sheriffs have been required to take an Oath to execute the Act against gambling, and the constitutionality of such oaths has never been drawn in question.)

When an instrument contains the complete sense of the parties, there is no difference between adding to it and taking away. All interpolations are equally forbidden, whether the words of the instrument be positive or negative. In fact negative words are unnecessary when the positive expressions are clear. An estate for life, is the same whether the words and no longer, be added or not. The constitution says Sheriffs shall hold their offices 4 years—the Legislature could not extend the term to six. The Oaths alluded to may perhaps be considered as incident to the duties of the office—duties which must be discharged after the party is clothed with the office, and for the neglect of which he may be punished. But if such oaths be considered as a qualification and put on the same footing as the constitutional oath, they cannot be supported. A contrary construction would make the constitution nugatory—and authorize a latitude in relation to it, which the law does not allow even in ordinary writings. So much does the law favour certainty in the construction of compacts that independent of the Statute of frauds, no addition can be made by parol to that which is in writing. We are obliged to compare great things with small, but the analogy is direct and obvious for the application of the same principles to the constitution, which is a deed of the most solemn nature, and which must regulate the whole subject—or all its provisions may be eluded.

But perhaps it may be contended that if the Legislature have power under the ordinance to impose an Oath of absolute allegiance, they may execute the power, by enacting an Oath of qualified allegiance. In all reasonings ambiguity of language is a fruitful source of error—and the object of all discussions which aim at truth, is to strip off the veil of equivocal words, and to arrive at correct definitions of things. There are different meanings attached to the word "allegiance to the State," but qualified allegiance is one thing, and absolute allegiance is another thing. And the ordinance does not authorize the Legislature to impose an oath of qualified allegiance, for it denies that the allegiance of the citizen is, or of right can be qualified. *We* acknowledge a qualified allegiance to the State, but the ordinance does not call for an Oath, affirming such allegiance, but for an Oath to put down the supposition of such a thing. It is no less than absurd to say that the power to do a particular thing, may be well executed, not only by doing a different thing, but by doing the very reverse. There is no distinction of more or less between things of different natures—and in the construction of private powers, an authority to do a particular Act could never be executed, by doing something else. A license to sell gunpowder would be no license for Saltpetre, nor a contract for any particular drug be complied with by the delivery of one of the simples of which it is compounded. The Oath administered by the Legislature might even be less objectionable than one in the terms of the ordinance. But this would only show that it is not the same Oath. If the Oath in the Military Bill is not a Test Oath, it amounts to the same thing as the Oath prescribed by the Constitution, to protect and defend the Constitution of this State and of the United Staies, but it is just as far from reason to call it the Oath of the Constitution as the Oath of the Ordinance.

But in fact, this oath is doubly objectionable, for the very cause that it is ambiguous. Is it to be endured that a man shall be called on to swear to an ambiguous declaration? Among all the abuses of power, a certain pre-eminence is due to the singular wickedness and enormity of the wretch who caused the laws to be promulgated in such a way as to be purposely unintelligible. And if there was no other objection against the oath which our present rules have prescribed to be taken by honorable men, under pain of disfranchisement, the ambiguity and equivocation which lurk in its meaning, are sufficient to entitle it to the condemnation of all mankind.

In these circumstances, the duty of the Court is plain. The free and generous principles of the law, which the Court is sworn to administer, favors liberty. The warrant which deprives the humblest citizen of his liberty must be clear—much less can it be endured that such a sweeping disfranchisement should be sustained by a doubtful interpretation—and as the Legislature have not thought fit to refer to the Ordinance, the Court will take

the law as they find it, and if it does not conform to the constitution, declare it null and void.

Should we be so unfortunate however, as not to be supported by the Court in the preceeding grounds, we contend that even if this act be passed in pursuance of the power given by the Ordinance, it is not an execution of that power—inasmuch as the Legislature could only carry the proposed change into effect by an alteration of the constitution.

It will be less necessary to dilate upon this head because we have the contemporaneous exposition of the Legislature in our favor. It is unnecessary for us to contend that the convention could not alter the constitution. It is sufficient for our purpose that they have not in fact done so—and all that it is necessary for us to prove is, that they could not delegate their authority over the constitution (if they have it) to the Legislature. A member of the Legislature cannot act by deputy—neither can the whole Legislature. The reason is obvious, the trust which is reposed in them is a personal confidence. And the reason which prevails in every case, applies in the highest degree to the convention collectively, which was invested with the most important trust. These remarks are in strict conformity with the opinions of Judge Nott in the case of Pinckney *vs.* the City Council.* It is repugnant to reason that the convention should delegate its supremacy over the constitution to a body like the Legislature, which is subordinate to the constitution: If they had abolished the 4th article of the constitution, and left it to the Legislature to Act without restriction, the objection might not apply—but they have left it to the Legislature to alter the constitution or not in their discretion, which is against first principles. Again, the power of the convention itself was limited to one year—and every tyro knows, that whatever is done under a power, is referred by the law to the principal, or to the instrument containing the power. But the Military Bill was passed after the expiration of the year, which proves to demonstration that the Act of December, 1833, could not derive its authority from the convention.

3. But we contend in the third place, that in this particular, the Convention exceeded their powers delegated to them by the people. The act which called the Convention, was passed in the forms of the Constitution. The Convention was therefore, a constitutional body, and it is preposterous to speak of constitutional power as unlimited. As long as the distribution of power between the three Departments of Government exists, there can be in fact no such thing as absolute power. The only way in which a convention can become absolute is by usurpation—their power would then be unlimited in the same degree in which it is unlawful. But whatever they might have done, they did not in fact, seize all power into their own hands, and having met and deliberated under the authority of the acts which called them together, it is too late now to deny that they were limited by its provisions. But this question may be settled with perfect certainty. If this court should decide, that the Convention exceeded their power, can any one doubt that the Ordinance becomes immediately a dead letter. Yet if the Convention was not unlimited, it is impossible to deny that the duty of defining allegiance, and devising Test Oaths, formed no part of the subject committed to their charge. Indeed, the matter of the present dispute is so alien from the purpose of their proceedings, that it is not referred to even in the title of the Ordinance in which it is found.

Lastly. The Ordinance of March, 1833, in this particular, at least, is repugnant to the Constitution of the United States.

The Constitution, and the laws of the United States *made in pursuance thereof*, are the supreme law of the land. The allegiance of the citizen, in the only sense in which the word can be tolerated in a republic, is due to the law. What idea other men may have of a law higher than the supreme law, I know not. Like the notion of the Stoics concerning Fate, it is perfectly incomprehensible.

But again, treason against the United States consists in levying war against them or adhering to their enemies. But, in the language of the law, treason and the violation of allegiance are convertible terms. Every indictment for treason, concludes *contra Ligeantiæ suæ debitum* 1. H. H. 58. Fos. 183.

Unless a contradiction in terms, as direct as an issue in fact, be required, no stronger or more palpable example of repugnance to the Constitution can be imagined, than is afforded by the ordinance, which declares that no allegiance is due to the United States. I shall merely call the attention of the Court to the decision in the cases of Jansen, Williams, and The Charming Betsey, which I shall do by briefly referring to Kent's Commentaries vol. 2. page 42. In fact the Ordinance is not only repugnant to the Constitution, but in direct collision with it. I have no inclination, nor strength to pursue the argument. In 1788, Mr. Madison warned the people of the inconsistency committed, in the old articles of confederation. "of endeavouring to accomplish impossibilities; to reconcile a partial Sovereignty in the Union, with complete Sovereignty in the States; to subvert a mathematical axiom, by taking away a part and letting the whole remain." But the blindness that could overlook a mathematical truth is nothing in comparison with the hallucination that goes back, in 1834, to the Articles of the Confederacy for the Constitution.

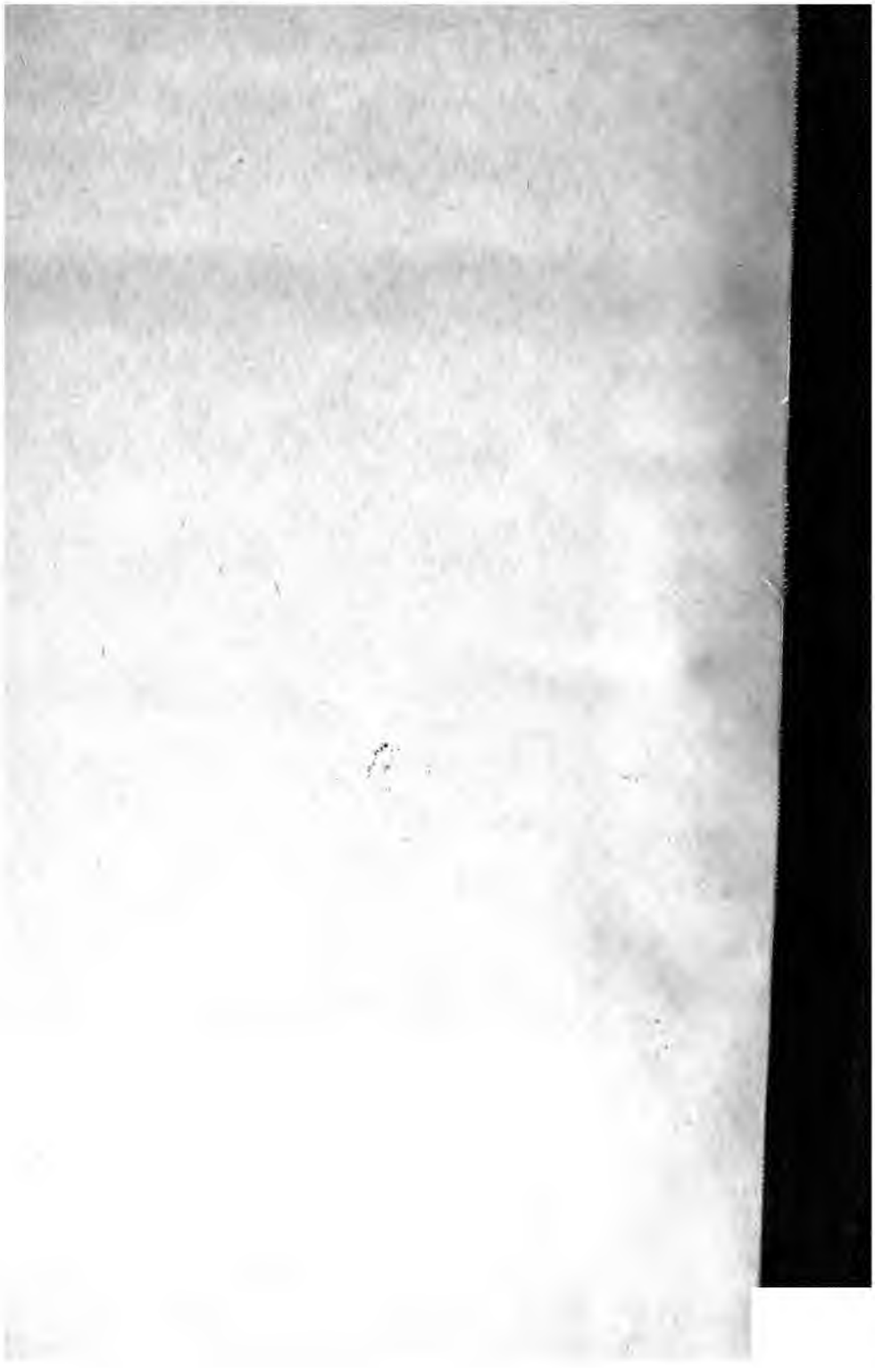
NOTE.

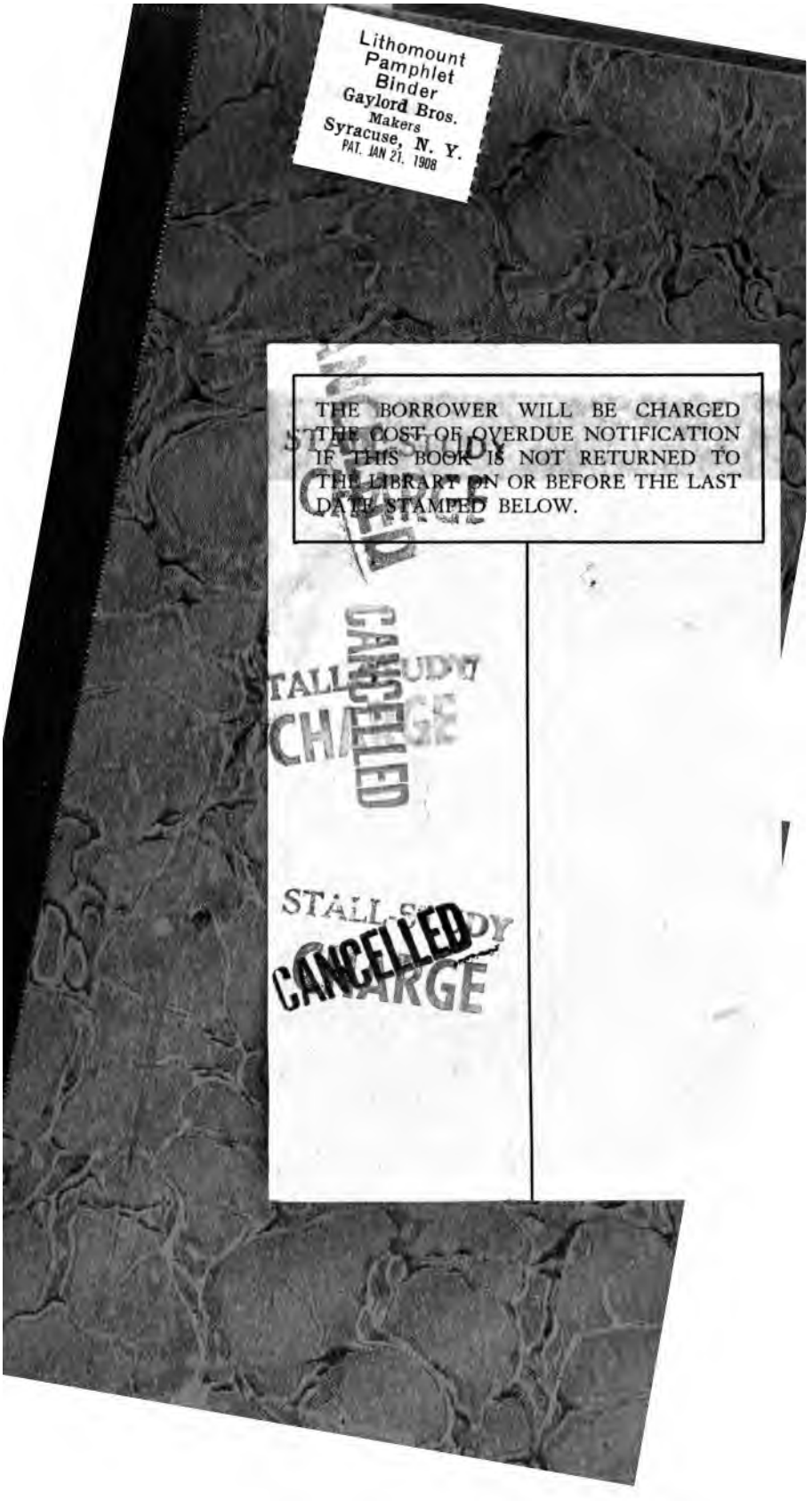
The IV. article was evidently designed as a barrier against all Tests. It was by the constitution of 1790 that they were first removed. Even the constitution of 1778 left the disabilities of Jews and Catholics in full force. The Oath of office in the constitution is entirely misplaced if it sets no bounds to Legislative power—which is clearly the end and aim of all constitutional instruments. But if the Legislature can annex new qualifications and new Oaths to the conditions of office, this article of the constitution is without meaning or utility—the constitution requires every officer to be sworn to support the constitution of the State and the United States, the Act adds that he must be further sworn to bear true allegiance to the State. The last provision is neither more nor less than an amendment of the former, and if both be equally obligatory the difference between an Act and a Constitution in point of authority is idle and delusive. The remarks of Mr. Leigh, on a similar occasion are equally distinguished by truth and eloquence.

"Of the doubt as to the constitutionality of this law (the Virginia Act requiring an Oath against duelling from all officers) the more he pondered on it, the deeper impression it had made on his mind. Our Constitution, Art. 14, provided that certain officers shall have fixed and adequate salaries and together with all others holding lucrative offices, and all Ministers of the Gospel of every denomination, be incapable of being elected members of either house, or the Privy Council." Now these

*1 Tread. 49.

the only constitutional qualifications, the strong implication was that there should be NO OTHER.—And there would be no doubting it, but for another provision of the constitution, "that Delegates and Senators shall be chosen of such men as actually reside in, and are freeholders of the county, *or duly qualified according to law*. As to which Mr. L. remarked, that these very words were plainly meant to *fix* a qualification; otherwise the whole passage had as well been omitted and the subject left entirely to Legislative discretion, whence the phrase *duly qualified according to law*, must refer to some pre-existent or coeval, not future laws, &c. But if the words of the constitution were doubtful, its spirit could not be mistaken. If the Legislature might add one qualification they might add many; multiply disabilities without end; disqualify whole districts or classes of men by personal or local description, make an academical degree, or even a previous service in one of its own bodies a necessary qualification, and thus convert the government into an oligarchy. If this tremendous power existed at all, it was boundless and untrammelled as the winds, and dissipated at once all our fond notions of a written Constitution, late the glory of American politics. The Test Laws particularly, were the first weapons, young oppression would learn to handle; weapons the more odious, since though barbed and poisoned, neither strength nor courage was requisite to wield them. Should we rely on public virtue to keep us from the use and extension of this system of Tests? In no age nor clime nor Nation, had ever virtue wholly swayed the human bosom and actions; man was universally liable to be transported with passion, blinded with folly, corrupted with vice, and yet more with power; maddened with faction, and fired with the lust of domination: let us not flatter ourselves. We were not exempt from the common lot; and although the wise exposition of the Bill of Rights by the act to establish religious freedom, might for a time secure us from a *Religious* Test, a *Political* one, was certainly a possible, perhaps a probable, and not very remote event. Sir, I am possessed with a strange delusion, if this very law in question does not appoint a *Political Test*. Such are the BEGINNINGS. The end of all these things is death. A free Constitution cannot co-exist with this dangerous and paricidial power in the hands of the ordinary Legislature. I recur therefore to the fundamental principle of the Revolution, which I take to be *obsta principiis*, and directly submit the Constitutionality of this Law, to the judgment of the Court."

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